INDEX

Page

Petition for Writ of Certiorari 1

Question Presented 5

History 6

Facts 8

Arguments 8

- Conscientious denied right of Companionship 8
- Decree Denies Religious Liberty 10
- State Influences Religious Doctrine 12
- Unscrupulous Given Unfair Advantage over Conscientious 13

Conclusion 14

CASES CITED

Arver vs. United States, 245, U. S. 366 13

Grosjean vs. American Press Co., 297 U. S. 233 11

Meyer vs. Nebraska, 262 U. S. 390 8

Pierce vs. Society of Sisters, 268 U. S. 510 12

Reynolds vs. United States, 98 U. S. 145 10

AUTHORITIES CITED

Ohio General Code Section 11631 1

United States Constitution Amendments 1 & 14 .. 2, 5, 6

MISCELLANY

Bible Scripture cited 9, 10

Decrees unaffected by this case 11

IN THE

Supreme Court of the United States

..... Term 195

No. .....
C. A. 4657

CAP S. MCELROY,
Petitioner

vs.

PERLINA MCELROY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

The petition of Cap S. McElroy respectfully asks for a writ of ceritorari directed to the Sixth Appellate District Court of Appeals, in and for Lucas County, Ohio, the Court in which the record of this cause is now lodged and shows that this action was commenced in the Court of Common Pleas, Division of Domestic Relations of Lucas County, Ohio by Cap S. McElroy against Perlina McElroy to vacate a decree of divorce after term under Ohio General Code Section 11631.

On December 6, 1946, Respondent, Perlina McElroy brought action for divorce against Petitioner, Cap S. McElroy in Lucas County, Ohio, Domestic Relations Cause No. 24651 but this action was dismissed on June 3, 1948 for want of jurisdiction.

Respondent brought a second action for divorce on September 23, 1948, and a decree of divorce granted on June 17, 1949. Case was appealed to the Court of Appeals which affirmed the decree and a motion was filed in the Supreme Court of Ohio to certify the record but same was overruled on March 23, 1950.

Paul B. Shawen of Toledo, Ohio was at first the attorney for Petitioner, but when he would not agree to fight the case on the issue of religious freedom and appeal to Court of last resort, attorneys were switched in the middle of the case, and Edward R. Moran of Toledo, Ohio who had agreed to fight the case all of the way to the United States Supreme Court on the religious liberty issue was employed. Mr. Moran refused to appeal case to this Court and it was impossible to get another attorney within the limitation of time.

Petitioner without the aid of counsel or law teachers began to study law in private because of a deep conviction that his religious rights were impaired.

Under Ohio General Code Section 11631, Petitioner filed a petition to reopen the case and vacate the decree of divorce, on March 13, 1952. Petitioner in the Court of original jurisdiction raised constitutional questions citing the First and Fourteenth amendments to the Constitution of the United States. Respondent filed a demurrer and ridiculed, but did not answer, the charge of violation of Constitutional rights.

Respondent in demurrer made the following charges:

1. Petition did not state facts.
2. Conviction for false testimony was necessary in order to vacate a decree for false testimony.
3. Action was not commenced within time limitations.
4. Petition was not verified by affidavit.
5. Case should be captioned in the original cause and not a separate action.

6. Petition was frivolous.
7. Petitioner was suffering from a "Relapse" of mental illness.
8. Ridiculed, but did not answer, constitutional question raised.

In the Court of Appeals for Lucas County, Ohio, Respondent further raised the issue of Petitioner signing the journal entry.

The Court of Common Pleas sustained the demurrer on May 29, 1952 without opinion. What the Court decided is a mystery. It might have believed that Petitioner was right on seven of the eight charges made by Respondent. The Court of Appeals affirmed without opinion, the action of the Court of Common Pleas.

Petitioner filed with the Supreme Court of the State of Ohio, a motion for an order directing the Court of Appeals to certify its record, also a motion for leave to appeal as of right. Both motions were argued on April 10, 1953 and acted upon adverse to the Petitioner on April 15, 1953, however Respondent did not file a brief nor make an appearance in the Supreme Court of the State of Ohio.

Petitioner claims that this Honorable Court has jurisdiction of the subject matter of this case because no case like it has ever been acted upon by this Court and it is repugnant to the First Amendment to the Constitution of the United States, supplemented by the Fourteenth Amendment which makes the First binding upon the States.

The Courts below are denying to petitioner his right of marriage, unless he is willing to cast aside the teaching of the Holy Bible.

Marriage and divorce have by tradition been under the jurisdiction of the States yet a marriage relationship goes with one across State lines.

Petitioner does not claim that all divorces are unconstitutional, no more so than the military draft is unconstitutional because some persons religiously oppose bearing arms.

A certified copy of the transcript of the record of the proceedings in all said Courts in this case including the Supreme Court of the State of Ohio is submitted herewith.

Your Petitioner is advised and believes that the judgment of the Court of Appeals and the refusal of the Supreme Court of Ohio to review in this case are erroneous in manner and form as herein set forth as appears from said transcript of the record and proceedings, and that this Honorable Court ought to require this cause to be certified to it for review, consideration, and final determination, as provided by law.

Wherefore your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Court of Appeals for the Sixth Appellate District of Ohio commanding said Court to certify under the seal thereof and send to this court on a day certain to be named a full and complete transcript of the record and all proceedings of the said Court of Appeals for the Sixth Appellate District of Ohio in this cause to the end that the judgment of said Court of Appeals for the Sixth Appellate District of Ohio, may be reviewed, considered, and determined as provided by law, and that this Honorable Court may correct the errors complained of herein by your Petitioner and reverse said judgment of the Court of Appeals for the Sixth Appellate District of Ohio, and remand said cause and grant such other and further relief as from the nature of the case your Petitioner may be entitled in pursuance to law.

Cap S. McElroy
Petitioner

IN THE

Supreme Court of the United States

..... Term 195

No. .....
C. A. 4657

CAP S. MCELROY,
Petitioner

vs.

PERLINA MCELROY,
Respondent.

BRIEF OF PETITIONER

QUESTION PRESENTED

1. Can a State under the First Amendment to the Constitution of the United States supplemented by the Fourteenth Amendment force upon one against his religious conviction a marriage standard repugnant to the teaching of the Holy Bible, while his unscrupulous mate is permitted companionship with another?

WHY THIS CASE IS OF PARTICULAR INTEREST

Because of an idea that has been instilled in the minds of people that it is useless to oppose divorce in the Courts, case after case is won, uncontested, the defendant is seemingly powerless to contest.

Petitioner believes that instead of failure to get along congenially causing divorce that the reverse is true; that the practical certainty of divorce if one party wants one regardless of the other makes unscrupulous persons indifferent whether they are congenial or not.

On the face of the matter, the following would not be affected by the decision in this case, viz: Couples who are happily married, couples of which both parties want a divorce or where neither religiously opposes it, unmarried persons. Hence, the only persons affected by this case would be couples of which one wants a divorce and the other religiously opposes it. That may look like a small percentage; however with this case to cite as a test case, many future marriages can be saved just as Petitioner's and Respondent's marriage would have never had the obstacles had a previous case been decided by this Court on this issue.

HISTORY

This case was commenced on March 13, 1952 by Petitioner Cap S. McElroy against Respondent Perlina McElroy to vacate after term under Ohio General Code Section 11631, a decree of divorce on the ground that the decree was granted under false testimony, that Petitioner at bar in original case was prevented from properly defending due to being double-crossed by his attorney. Petitioner further charged that the decree violated the First amendment to the Constitution of the United States supplemented by the Fourteenth Amendment which makes the First binding upon the States, if one party opposes divorce on religious grounds. This divorce became final on March 23, 1950 within less than two years prior to reopening case.

On December 6, 1946, the Respondent Perlina McElroy brought action for divorce in Lucas County, Ohio, Domestic Relations cause No. 24651. Petitioner employed as counsel, Paul B. Shawen of Toledo, Ohio, to defend, but when Mr. Shawen would not agree to fight on the religious liberty issue and appeal on that issue, attorneys were switched in the middle of the case (see letter under date of April 30, 1948). Mr. Edward R. Moran of Toledo, Ohio, was employed as he agreed to fight the case on the religious liberty issue and appeal to the Court of last resort. This case was dismissed on June 3, 1948 for want of jurisdiction.

On September 23, 1948, Respondent, Perlina McElroy filed a second action for divorce in Lucas County, Ohio, Domestic Relations Cause No. 28755 which was properly answered. Case was heard in the Court of Common Pleas of Lucas County, Ohio on June 17, 1949 and a decree of divorce granted. This case was appealed to Court of Appeals for the Sixth Ohio Appellate District and case affirmed on December 19, 1949. On January 9, 1950, a motion was made to the Supreme Court of the State of Ohio directing the Court of Appeals to certify its record which was overruled on March 23, 1950.

Petitioner's attorney at that time was in transition from one law firm to another and refused to appeal case to this Court as he had agreed. Petitioner began to seek other counsel but to no avail.

Reverting back to the commencement of this case:

Respondent filed a demurrer to this petition on April 29, 1952. Demurrer was argued in the Court of Common Pleas of Lucas County, Ohio on May 8, 1952 and Demurrer sustained on May 29, 1952. Case was appealed to the Court of Appeals for the Sixth Appellate District of Ohio and action of the Court of Common Pleas affirmed without opinion on January 19, 1953.

Petitioner filed with the Supreme Court of the State of Ohio a motion for appeal as of right, also a motion directing the Court of Appeals to certify its record. The Motion to certify was overruled and the appeal as of right dismissed on April 15, 1953. Respondent filed no brief and made no appearance in the Supreme Court of the State of Ohio.

FACTS

Attorneys were switched in the middle of the case of Lucas County, Ohio Domestic Relations Cause No. 24651 (see letter under date of April 30, 1948).

Respondent has never made any answer to Petitioner's claim that his Constitutional rights were impaired and did not file a brief in the Supreme Court of the State of Ohio.

Religion was introduced in the trial at which decree was granted. (See pp. 16-66-85 in Bill of Exceptions for Lucas County, Ohio, Domestic Relations Cause No. 28755).

Withholding a divorce does not differentiate between the conscientious and the unscrupulous. Granting a divorce does.

ARGUMENTS

Conscientious Denied Right of Companionship

In *Meyer vs. Nebraska,* 262 U. S., 390, this Court has made unmistakably clear the right of one to matrimony, and the right to worship God according to the dictates of one's own conscience.

> "While this Court has not attempted to define with exactness the liberty thus guaranteed. * * * Without doubt, it denotes * * * the right of the individual * * * to marry * * * to worship God according to the dictates of his own conscience." p. 399.

The State of Ohio in forcing a divorce upon one against his religious belief in the matter and permitting his spouse without conscience to marry another is denying him the right of companionship unless he is willing to discard Bible teaching. Petitioner cites the following Scripture as reasons for holding to such belief. (King James version quoted)

> "But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery; and whosoever shall marry her that is divorced committeth adultery." Matthew 5:32
>
> "And he saith unto them, Whosoever shall put away his wife, and marry another, committeth adultery against her."
>
> "And if a woman shall put away her husband, and be married to another, she committeth adultry." Mark 10:11, 12.
>
> "What therefore God hath joined together, let not man put asunder." Mark 10: 9.
>
> "And unto the married I command, yet not I, but the Lord, Let not the wife depart from her husband: But, and if she depart, let her remain unmarried, or be reconciled to her husband: and let not the husband put away his wife." 1 Corinthians 7:10, 11.
>
> "Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have her own husband." 1 Corinthians 7:2.

Regardless of what led up to hostilities, the person desiring to follow the Bible is denied matrimony, unless he decides to discard Bible teaching while the one indifferent to its teaching enjoys a companionship with the blessings of society upon it.

Decree Denies Religious Liberty

While *Reynolds vs. United States,* 98 U. S. 145 is not in the record of this case, it was cited orally by the Court of Appeals for Lucas County, Ohio, so Petitioner will compare it with the case at bar.

Polygamy denies religious freedom rather than being justified by it. The ratio of women to men does not and never did permit the universal practice of polygamy, hence, one man having ten wives would cause nine other men to be without even one wife when they might desire to practice polygamy for religious reasons as much so as the first.

One man and one woman until death cannot be said to be to the detriment of the social order.

Petitioner cites Matthew 5:32 and 1 Corinthians 7:2 as examples that a wife (or husband) deserting the mate makes it more difficult for the deserted to live as he may desire, but since the First and Fourteenth Amendments are restraints against the Federal and State governments respectively, when they encourage the unscrupulous to desert the mate by offering the blessings of having another, the State is a party to interfering with one's religious rights.

Forcing divorce upon one against his religious conviction immediately places the unscrupulous to an unfair advantage as the unbeliever is armed with a weapon to force every petty whim upon the conscientious. Divorce removes from one his bargaining power with his mate. Matrimonial hostilities may be likened unto an employer-employee dispute, however in the latter the employer-employee relationship is never removed even though religion would not be involved if it were.

Petitioner does not claim that the following decrees are repugnant to the religious liberty clause in the Federal Constitution:

1. Divorce from bed and board only with a remarriage barred.

2. A divorce by mutual consent as this would not interfere with one's rights. (This is all that an uncontested divorce or a cross-petition amounts to.)

3. Divorce for adultery committed by either party while living together or by the deserter after separation. (No one who would commit adultery while living with the mate could convince a Court that he had religious scruples against committing the act through divorce and remarriage.)

4. Where party has been divorced and remarried and sued by a later spouse or where party has married a divorced person. (A person who has been divorced and remarried or has married a divorced person would have too much to explain to try to play up the religious freedom.)

In *Grosjean vs. American Press Co.*, 297 U. S. 233 this Court held that taxing newspaper advertising violates freedom of the press. Inasmuch as one could still pay the tax and say what he pleased, it seems as though that case was not so strong as the case at bar, on page 242 this Court states:

> "The validity of the act is assailed as violating the Federal Constitution in two particulars (1) that it abridges the freedom of the press in contradiction of the due process clause contained in paragraph 1 of the Fourteenth Amendment." • • •

This has been cited as freedom of press and freedom of religion is closely related.

Petitioner cites *Pierce vs. Society of Sisters,* 268 U. S. 510 which invalidated an Oregon state law requiring parents to send their children to public schools. This Court stated on page 534:

> "Under the doctrine of Meyer vs. Nebraska 262 U. S. 390 we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

Under the Act of 1922 parents were free to teach religion to their children in the home, but the Act made it more difficult to teach religion is why this Court held it repugnant to the religious liberty clause.

Divorce with right of remarriage likewise makes it more difficult for Petitioner to adhere to his religious belief on marriage.

State Influences Religious Doctrine

In June of 1952, The Presbyterian Church in the U. S. A. held a convention in New York and adopted a more liberal policy toward its clergy marrying divorced persons.

Petitioner recognizes the right of this or any other Denomination to adopt any doctrine on divorce that it wishes, so long as it is on its own free will; however a liberal civil government policy on divorce can influence a Church policy since a church may desire to keep in close touch with the unfortunates whose homes have been broken.

Many persons before divorce have opposed it religiously, only to change views after a decree was granted. This is State influencing persons to change views on a religious subject.

Unscrupulous Given Unfair Advantage Over Conscientious

Petitioner recalls once in childhood, being at a meeting where citizens were demanding the enforcement of Sunday closing laws. It was stated by one person:

> "We are not trying to force you to be religious by forcing you to close your business on Sunday, but if you open your place of business on Sunday, that forces your competitor to do likewise or else, forfeit his profits to you for that day."

Petitioner is not trying to force his wife, the Respondent, to be religious and accept the Bible teaching on divorce, but is asking this Court to disarm her of her unfair weapon so Petitioner and Respondent can bargain for reconciliation on equal terms.

This Court in *Arver vs. United States* 245 U. S. 366 on page 374 stated concerning drafting some for military service while exempting others because of religious conviction:

> "The law neither establishes a religion nor prohibits its free exercise. Section 4 contains nothing respecting the establishment of religion; on the contrary; it goes so far as to aid in the free exercise of those religions which forbid participation in war."

Petitioner believes that a belief that divorce and remarriage is sin should be aided by this Court for the benefit of Petitioner and others who believe that doctrine and it should enjoin states from giving unscrupulous mates an unfair advantage over the conscientious.

CONCLUSION

Inasmuch as Respondent has shown no interest in the case and would be denied no Constitutional right, all discrimination being against the person with religious scruples, this case being novel, Petitioner respectfully asks this Honorable Court to review this case and correct all errors and constitutional violations.

Respectfully Submitted,

Cap S. McElroy
(In Personam)

IN THE

Supreme Court of the United States

No. 177
October Term 1953

CAP S. MCELROY,
Petitioner

vs.

PERLINA MCELROY,
Respondent.

PETITION FOR REHEARING ON CERTIORARI

To The Honorable Supreme Court of the United States:

The petition of Cap S. McElroy respectfully asks for a rehearing on a writ of Certiorari directed to the Sixth Appellate District Court of Appeals in and for Lucas County, Ohio for the following reasons:

The benefits to be derived from the decision that petitioner believes to be right are so great that a careful study should be given to the legal points.

Since the Respondent is not contesting this case, this is the ideal case for a test case, and without cost to Respondent.

A decision for Petitioner would hasten the enactment of the much needed legislation long overdue.

Cap S. McElroy

INDEX

Page

Petition for a Writ of Certiorari 1

Questions Presented 5

History 6

Facts 7

Arguments 8

This Court Has Jurisdiction Because Petitioner Had No Notice of Proceedings 8

Petitioner Was Discriminated Against for Occupational Reasons 9

CASES CITED

Cassell vs. Texas, 339 U. S. 587 10

Dick vs. Railroad Co., 38 O. S. 389 11

Gibbs vs. Girard, 102 N. E. 299 11

Norris vs. Alabama, 294 U. S. 587 10

Pierce vs. Louisiana, 306 U. S. 354 10

Scott vs. McNeal, 154 U. S. 34 8

Wolf vs. Marshall, 165 N. E. 848 11

AUTHORITIES CITED

Ohio Constitution Article I, Sec. 5 9

U. S. Constitution Amendment XIV 2, 5, 6

O. G. C. Sec. 1532 9

O. G. C. Sec. 11378 9

O. G. C. Sec. 11379 9

O. G. C. Sec. 11384 10

O. G. C. Sec. 11631 ..... 1, 3, 6, 11

IN THE

Supreme Court of the United States

No. .....

CAP S. MCELROY,
Petitioner,

vs.

COBOURN, YAGER, NOTNAGEL, SMITH & MORAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH APPELLATE DISTRICT OF OHIO

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

The petition of Cap S. McElroy respectfully asks for a writ of certiorari directed to the Sixth Appellate District Court of Appeals, in and for Lucas County, Ohio, the Court in which the record of this cause is now lodged and shows that this action was commenced in the Court of Common Pleas of Lucas County, Ohio, by Cap S. McElroy against Cobourn, Yager, Notnagel, Smith & Moran, to vacate after term, under Ohio General Code Section 11631 a judgment rendered without the knowledge of Petitioner in which he had no opportunity to appear and defend.

On September 7, 1950, Cobourn, Notnagel, Smith & Moran, (Yager joined firm later) filed a petition charging that Petitioner owed the firm a sum of money totaling Two Thousand, Five Hundred and Sixty ($2,560.67) Dollars and Sixty-Seven Cents. Petitioner filed an answer within the limitation of time denying the allegation and setting up a breach of contract as a defense. Respondents with the Court of Common Pleas brought this case up for hearing without notifying Petitioner whereby he had no opportunity to appear and defend, and he never learned of this until it was too late to file an appeal.

Petitioner tried to correct this error through filing a new petition under Ohio General Code Section 11631 to reopen the case after term and vacate the judgment. Petitioner filed his petition in the Court of Common Pleas of Lucas County, Ohio, on June 2, 1952, and petition was dismissed on August 9, 1952. An appeal was taken to the Sixth Appellate District Court of Appeals in and for Lucas County, Ohio, which on January 19, 1953, affirmed without opinion the action of the Court of Common Pleas. Petitioner filed a motion for opinion in the Court of Appeals and the same motion was ordered stricken from the files, and decision was journalized on February 2, 1953. Petitioner filed with the Supreme Court of the State of Ohio an appeal as of right, also a motion for order directing the Court of Appeals to certify its record. The motion to certify was overruled on April 15, 1953, and the Appeal as of Right dismissed on same day.

Petitioner claims that this Honorable Court has jurisdiction of the subject matter in this case because it is repugnant to the Fourteenth Amendment to the Constitution of the United States. Petitioner has been deprived of property without due process of law and denied the equal protection of the laws.

In the original case No. 173628 filed on September 7, 1950, petitioner was not notified of the time and place of taking the judgment, hence had no opportunity to appear and defend, hence, judgment taken without due process of law. He was denied jury trial as guaranteed by the Constitution of Ohio, Article I, Section 5, which he had asked for.

Ohio General Code Section 11631, offered an opportunity to have this error rectified even though Petitioner did not know of this in time to appeal within the limitation of time, yet the Courts of Ohio have denied him his right to rectify any injustice done him.

A certified copy of the transcript of the record of the proceedings in all said Courts in this case including the Supreme Court of the State of Ohio is submitted herewith.

Your Petitioner is advised and believes that the judgment of the Court of Appeals and the refusal of the Supreme Court of the State of Ohio to review in this case are erroneous in manner and form as herein set forth as appears from said transcript of the record and proceedings, and that this Honorable Court ought to require this cause to be certified to it for review, consideration and final determination, as provided by law.

Wherefore your Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Court of Appeals for the Sixth Appellate District of Ohio, commanding said Court to certify under the seal thereof and send to this Court on a day certain to be named a full and complete transcript of the record and all proceedings of the said Court of Appeals for the Sixth Appellate District of Ohio, in this cause to the end that said judgment of said Court of Appeals for the Sixth Appellate District of Ohio, may be reviewed, considered and determined as provided by

law, and that this Honorable Court may correct the errors complained of herein by your Petitioner and reverse said decision of the Court of Appeals for the Sixth Appellate District of Ohio, and remand said cause and grant such other and further relief as from the nature of the case your Petitioner may be entitled in pursuance to law.

CAP S. MCELROY,
Petitioner.

IN THE

Supreme Court of the United States

No. .....

CAP S. MCELROY,
Petitioner,

vs.

FRANK M. COBOURN, JOSEPH A. YAGER, LELAND H. NOTNAGEL,
FRED A. SMITH, EDWARD R. MORAN,
doing business as
COBOURN, YAGER, NOTNAGEL, SMITH & MORAN,
Respondents.

SUPPORTING BRIEF OF PETITIONER

QUESTIONS PRESENTED

The Petitioner presents the following questions to this Court for consideration:

1. Is equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States violated when state laws, both constitutional and statutory, guarantee trial by jury, and jury trial was both asked for and denied; especially when the adverse party is an attorney, habitually practicing before judge who granted judgment thus being highly favored by same?

2. Should an attorney be sole arbitrator and jury in suit between an attorney and a layman when the

suit involves the former's trade as a tradesman, and the latter objects?

3. Is taking a judgment without notification to the party, nor giving him a chance to appear and defend, a violation of the due process of law clause in the Fourteenth Amendment to the Constitution of the United States?

HISTORY

This case was commenced by Petitioner in the Court of Common Pleas of Lucas County, Ohio, on June 2, 1952, to vacate after term, a judgment which had been taken without the knowledge of Petitioner or his having a chance to appear or defend.

On September 7, 1950, Cobourn, Notnagel, Smith & Moran, (now Cobourn, Yager, Notnagel, Smith & Moran) filed a Petition against Petitioner, claiming that Petitioner owed the firm legal fees. Petitioner filed an answer within time limitation denying the allegation and asking for jury trial. Petitioner heard no more of this case until on Saturday, November 18, 1950, he learned that a judgment had been taken in his absence and without his knowledge or chance to appear and defend. This judgment was taken on October 31, 1950, and the next business day after November 18, 1950, would be too late to take an appeal.

Under Ohio General Code Section 11631, Petitioner was offered a remedy for this action and on June 2, 1952, filed his petition to correct same. Respondents filed a demurrer to the petition on July 11, 1952, and demurrer was sustained on August 9, 1952. A Notice of Appeal to the Court of Appeals was filed and heard on January 5, 1953. Action of the Court of Common Pleas was affirmed on January 19, 1953, without Opinion. Petitioner filed a

motion for Opinion with the Court of Appeals which was stricken from the files and action of the Court of Appeals journalized on February 2, 1953.

On February 20, 1953 Petitioner filed his notice of appeal to the Supreme Court of the State of Ohio which was an appeal as of right and also a motion for an order directing the Court of Appeals to certify its record. The motion to certify was overruled and the appeal as of right was dismissed, both on April 15, 1953.

Petitioner filed with the Chief Justice of the State of Ohio his Petition for Appeal and Assignment of Errors on June 10, 1953, which was disallowed on June 22, 1953.

FACTS

Petitioner was not present at the hearing of Cause No. 173628 in the Lucas County, Ohio, Court of Common Pleas. (See Journal Entry) Respondents claim that he was notified of the hearing; Petitioner denies it.

Petitioner asked for jury trial in C. P. Cause No. 173628 and jury trial was not had (see Petitioner's answer).

Petitioner had denied the charges in C. P. Cause No. 173628.

In case at bar Petitioner stated as facts that Respondents had practiced fraud, that he was not notified of the time and place of taking the judgment. Respondents did not deny it (see original Petition and Demurrer).

ARGUMENTS

This Court Has Jurisdiction Because Petitioner Had No Notice of Proceedings

Since Petitioner had no notice of the proceedings in Lucas County, Ohio, Common Pleas Cause No. 173628 which was a petition by Respondents to obtain the original judgment, judgment was without due process of law in violation of the Fourteenth amendment to the Constitution of the United States.

In *Scott vs. McNeal*, 154 U. S. 34, this Court ruled:

> "No judgment of a Court is due process of law if rendered without jurisdiction in the Court or without notice to the party." (p. 46)

Since Petitioner did not learn of this in time to appeal within the limitation of time, the laws of Ohio offered another remedy which was Ohio General Code, Section 11631, which reads:

> "The Common Pleas Court or the Court of Appeals may vacate or modify its own judgment or order, after the term at which it was made (ten Items). Item 4. For fraud practiced by the successful party in obtaining a judgment or order. Item 7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending. Item 9. For taking judgments upon warrants of attorneys for more than was due the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking the judgment."

Petitioner is using this method of correcting an illegal procedure, as appeal within the time limit was impossible due to Petitioner having no notice of the precedure.

Petitioner Was Discriminated Against for Occupational Reasons

The Constitution of Ohio, Article I, Section 5, reads:

> "The right of trial by jury shall be inviolate, except that in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

Ohio General Code, Section 11379, provides:

> "Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial be waived or a reference be ordered as hereinafter provided."

Ohio General Code, Section 11378, further provides:

> "An issue of fact arises:
>
> "1. Upon a material allegation in the petition denied by the answer.
>
> "2. Upon a counter-claim or new matter, presented in the answer and denied by the reply."

Petitioner realizes that the Constitution of the United States does not within itself make trial by jury the law of the states, however, if state law provides for trial by jury as is the case in Ohio, then the "Equal Protection of the Laws" clause of the Fourteenth Amendment makes the jury trial apply to all persons in that state alike.

Since Petitioner in C. P. No. 173628 denied the material allegation in Respondents' Petition such as owing the obligation and further set off the counter-claim or new matter in the form of Breach of Contract to appeal, which was never replied to, Petitioner raised an issue of fact which should have been decided by a jury.

Petitioner did not wish to have the facts decided by the Court for reason that under Ohio law, all Common Pleas Judges must be attorneys (see Ohio General Code, Section 1532) and Respondents also were attorneys and

case involved their trade as tradesmen. Such could be compared with a strike in an industrial establishment in which a member of the striking union were made sole arbitrator, or an industrial manager, being made sole arbitrator.

If case involved parties being involved in an automobile wreck, no persons trade as a tradesman would be involved and Petitioner would not have so strong a case to charge occupational discrimination, but C. P. No. 173628 did involve Respondents' trade as tradesman.

Petitioner asks this Court being all attorneys to give the same justice to one outside that profession against an attorney as this Court being all white has given to other races in litigation against whites. In *Pierce vs. Louisiana,* 306 U. S. 354, this Court ruled:

> "* * * trial by jury cease to harmonize with our traditional concept of justice at the moment particular groups, classes or races otherwise qualified to serve as jurors in a community are excluded as such from jury service." (p. 358)

The above case involves the conviction of a negro for murder by an all-white jury. The case at bar involves a civil suit between a law firm and a person outside of the legal profession in which the former obtained a judgment against the latter by a jury of all attorneys, or that is what it amounts to when the Trial Judge usurps the authority conferred by state law upon a jury of twelve citizens.

The discrimination from jury service because of race is condemned by this Court in many other cases, see:

Norris vs. Alabama, 294 U. S. 587;
Cassell vs. Texas, 339 U. S. 282.

Ohio General Code, Section 11384, provides:

> "Cases in which there is an issue of fact or damages to be assessed, shall be tried in the order in

> which they stand on the trial docket, unless by the consent of parties, or by the order of the Court, they are continued or placed at the heel of the docket, or for good cause shown may be especially assigned for trial or hearing out of their regular order * * * "

Although case C. P. No. 173628 was filed more than thirty-three months ago and was heard in less than two months after filed, other cases filed sooner have been brought to trial only three months past. For the Ohio Supreme Court's interpretation of trial by jury in general cases, see:

Dick vs. Railroad Co., 38 O. S. 389;
Gibbs vs. Girard, 102 N. E. 299.

The reason that Case C. P. No. 173628 was not appealed but Petitioner is trying to rectify through this case through Ohio General Code, Section 11631 is that Petitioner did not know of that judgment until it was too late to appeal. In *Wolf vs. Marshall*, 165 N. E. 848, the Ohio Supreme Court ruled:

> "A majority of this Court are of the opinion that the legislature did not intend to require the performance of an impossible act."

CONCLUSION

Wherefore, Petitioner prays that this case be reviewed, reversed and remanded to the Court of Common Pleas of Lucas County, Ohio, for proceedings not inconsistent with the findings of this Court.

CAP S. MCELROY,
Petitioner.

FILED
NOV 16 1
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

No. 245
October Term 1953

CAP S. McELROY,
Petitioner

vs.

COSGRAVE, YAGER, NOTHAGEL, SMITH & MORAN,
Respondents.

Appeal From the Court of Appeals for the Sixth Appellate District of Ohio

PETITION FOR REHEARING ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH APPELLATE DISTRICT OF OHIO

CAP S. McELROY, *Petitioner*
P. O. Box 71,
Toledo 1, Ohio
Petitioner

COSGRAVE, YAGER, NOTHAGEL, SMITH & MORAN,
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Toledo 4, Ohio,
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CRITTENDEN PRESS, Printers, Toledo, Ohio

IN THE

Supreme Court of the United States

No. 245
October Term 1953

CAP S. MCELROY,
Petitioner

vs.

COBOURN, YAGER, NOTNAGEL, SMITH & MORAN,
Respondents.

PETITION FOR REHEARING ON CERTIORARI

To The Honorable Supreme Court of the United States:

The petition of Cap S. McElroy respectfully asks for a rehearing on a writ of certiorari directed to the Sixth Appellate District of Ohio for the following reason:

Since No. 177, this term deals with the greatest problem facing our nation today and this case has a background leading up to this case and connections leading up to this case were to keep this Court from deciding the questions presented in No. 177, this case should be acted on after wisely and carefully examining the former case.

Petitioner had judgment rendered against him in his absence and without his knowledge.

Cap S. McElroy